IN THE

Supreme Court of the United States

October Term, 1948

No. 360

FRED W. FINK,

Petitioner and Plaintiff-Respondent below,

vs.

SHEPARD STEAMSHIP COMPANY, a corporation,

Respondent and Defendant-Appellant below.

PETITIONER'S BRIEF ON THE MERITS

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I.

SUBJECT INDEX

SUBJECT INDEX (Continued)

TABLE OF CASES

TABLE OF CASES (Continued)

STATUTES

OTHER AUTHORITIES

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PETITIONER'S BRIEF ON THE MERITS

OPINION BELOW

This case involves an action by a seaman under the Jones Act (46 U.S.C. 688; 38 Stat. 1185; 41 Stat. 1007) against a steamship company for injuries received due to the negligent operation of a ship operated under a standard general agency agreement between the War Shipping Administration and the steamship company (Plf. Ex. 4; R. 106, 58). The case is identical with the case of *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, except that the injuries in this case were received *after* the effect date of the Clarification Act, also known as Public Law 17 (50 U.S.C. App. 1291, 57 Stat. 45).

while the injuries in the *Hust* case were received *prior* to the effective date of that Act.

This case comes before the Court on petition for writ of certiorari (granted November 22, 1948), to review the decision of the Supreme Court of the State of Oregon, which is reported in 46 Or. Adv. Sh. 393; 192 Pac. (2d) 258.

STATEMENT ON JURISDICTION

The grounds upon which it is claimed that a federal question is involved in this case are that your petitioner has from the institution of this case sought to specially claim and enforce a right or privilege under a statute of the United States, within the meaning of Section 237(b) of the Judicial Code, as amended (28 U.S.C. 344(b)), and, in addition, that respondent has from the institution of this case sought to specially set up and claim a right, privilege or immunity under a statute of and also under a commission held and/or authority exercised under the United States, within the meaning of said Section 237(b).

As already stated, this case is an action by a seaman relying upon the rights and privileges provided under the Jones Act (46 U. S. C. 688; 38 Stat. 1185; 41 Stat. 1007).

Additional grounds of jurisdiction result from the fact that both petitioner and respondent sought during the course of the proceedings in the courts of the State

of Oregon to confirm the existence of the rights, privileges and immunities respectively claimed by them by reference to the provisions of the Clarification Act, Public Law 17 (50 U.S.C. App. Sec. 1291; 57 Stat. 45), and the Supreme Court of Oregon in its decision endeavored to interpret and construe the provisions of that federal statute (R. 24-32)

For a more detailed statement on jurisdiction see the petition for writ of certiorari filed herein, pp. 4-14.

STATEMENT OF THE CASE

On June 8, 1943, petitioner shipped out as an able-bodied seaman on the Liberty ship S. S. George Davidson, after signing the usual shipping articles (Def. Ex. F, R. 109, 211). The ship was owned by the War Shipping Administration and operated under a standard general agency agreement between W. S. A. and Shepard Steamship Company, as general agent (Plf. Ex. 4, R. 106, 58). As usual, the crew for the ship had been furnished by a Union through its hiring hall (R. 87), and there were in effect Union agreements between the steamship company and various Unions (Plf. Ex. 1, 5, 9 and 10, R. 87, 98, 106, 135, 136 and 240). Despite the general agency agreement under which the vessel was operated, these Union agreements continued to negotiate for the settlement of disputes (R. 89, 90, 98; see also Plf. Ex. 11, R. 143, 70).

At about 7:30 P. M., on August 2, 1943, while said vessel was at sea two days out of the port of Hobart, Tas-

mania, plaintiff was ordered by the boatswain on said vessel to dump overboard the contents of several garbage cans. Other seamen were then and there available to assist in said task, but were not ordered to do so. The ship's garbage was disposed of by lifting it over the rail of the ship and dumping it overboard. The garbage can in question weighed in excess of 150 pounds and was large and bulky in size, and there was a heavy sea running at the time and the deck was wet and the ship was rolling and pitching heavily. As plaintiff was lifting said can, a sea rolled the ship and threw him off balance and threw the can back against him and his back gave way, causing the injuries complained of (R. 178, 179). His wages were later paid off by respondent company, with deductions for social security and "Victory tax" (Plf. Ex. 3, R. 102, 75).

It was stipulated that some Liberty ships were equipped with garbage chutes by which one man usually dumped garbage unassisted, while on other Liberty ships, including the vessel in question, no garbage chutes had been installed and sometimes one man performed the task and sometimes two men, depending upon whether the cans to be emptied were full. (R. 178)

In defense, respondent steamship company denied that it was engaged in the operation of the vessel, that it was the employer of the petitioner, and that petitioner had the right to file this action under the Jones Act in a State Court (Answer, par I, II and VI, R. 3,

4). Respondent also denied any negligence (Answer, par. III, R. 4).

By stipulation of the parties, the issue of whether plaintiff had the right to sue defendant under the Jones Act was tried before the Court, sitting without a jury, in advance of submitting to the jury the evidence on the question of negligence (R. 84). The trial Judge then rendered an opinion sustaining plaintiff's right to pursue this remedy (R. 173). The case was then submitted to the jury on the question of negligence (R. 178), resulting in a verdict and judgment for plaintiff in the amount of $9,000.00 (R. 5, 6). It has now been stipulated that there was sufficient evidence of damages and extent of injuries to sustain this verdict (R. 187).

On appeal by the respondent herein, the Supreme Court of the State of Oregon reversed this verdict and judgment (R. 10, 32). In reaching this conclusion it was held that although this Court had established in the *Hust* case that for purposes of the Jones Act the crew of such a vessel were employees of the steamship company operating it under a general agency agreement (R. 14), the provisions of the Clarification Act must be construed as indicating an intention of Congress, after the effective date of that Act, to destroy the right of such seamen to bring actions under the Jones Act against the steamship companies (R. 28).

SPECIFICATION OF ERRORS

The Supreme Court of the State of Oregon erred in holding that a seaman employed on a ship operated under the standard form of general agency agreement between the War Shipping Administration and various steamship companies and who was injured subsequent to the effective date of the Clarification Act, supra, does not have a cause of action which he may pursue in a state court under the Jones Act, with trial by jury, against such a steamship company as his employer for injuries received due to the negligent operation of the ship.

To so hold was error, for the following principal reasons:

1. This Court, in the case of *Hust v. Moore-McCormack Lines, Inc.*, supra, expressly held that seamen employed on ships operated under standard general agency agreements are still employees of the general agents for the purposes of proceedings under the Jones Act.

2. The provisions of the Clarification Act do not limit such seamen after the effective date of the Act to suits against the United States under the Suits in Admiralty Act and cannot be regarded as a "clear and unequivocal command" to destroy, after the effective date of that Act, the rights of such seamen to bring proceedings under the Jones Act against steamship companies engaged as general agents.

ARGUMENT

I. SEAMEN ON SHIPS OPERATED UNDER GENERAL AGENCY AGREEMENTS ARE EMPLOYEES OF GENERAL AGENTS FOR PURPOSES OF JONES ACT.

A. *This Principle established in Hust Case under similar Facts.*

In *Hust v. Moore-McCormock Lines, Inc.*, supra, it was held by this Court that private steamship companies engaged as agents by the War Shipping Administration under the terms of uniform general agency agreements are the employers of injured seamen for the purposes of the Jones Act. Thus, Justice Rutledge, speaking for the majority court in that case, reviewed the uncertainties and complexities of a contrary decision upon injured seamen and their dependents, as well as upon the Government (Id. 715-722); and (at p. 722) recognized that *"Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command", but that "it is not permissible to find one by implication"*, citing *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580. He went on to hold that nothing in the Suits in Admiralty Act or the General Agency Agreement of April 4, 1942, required or resulted in such a change (Id. at 723-725). The decision then goes on to state that:

> "We may accept the Oregon court's conclusion that technically the agreement made Hust an employee of the United States. * * * But it does not

> follow * * * that he lost all remedies against the operating 'agent' for such injuries as he incurred. This case * * * involves something more than mere application to the facts of the common law test for ascertaining the vicarious responsibilities of a private employer for tortious conduct of an employee. Here indeed is the respondent's (Moore-McCormack Lines) fallacy, for it assumes the case would be controlled by the common law rules of private agency." (Id. 723-724).

This conclusion by the Supreme Court of the United States was reaffirmed in the case of *Caldarola v. Eckert et al.*, 332 U.S. 155, at 159. In that case, involving a longshoreman injured on January 27, 1944, the Court, speaking through Justice Frankfurter, held, referring to the *Hust* case:

> "We there held that under the agency contract *the Agent was the 'employer'* of an injured person as that term is used in the Jones Act and a seaman could therefore bring the statutory action against such an 'employer'."

Thus this Court in the *Caldarola* case, although holding that under New York law a general agent is not an owner *pro hac vice* and, therefore, that a longshoreman cannot sue a general agent, not only distinguishes the *Hust* case, *but takes occasion to re-state its holding that general agents are employers of injured seamen for the purposes of the Jones Act—this by the very members of the Court who dissented in the Hust case*—thus giving every indication that the Court regards that principle as now established and intends to so regard it in future cases. The dissenting opinion by Justice Rutledge in

the *Caldarola* case makes it further apparent that the *Hust* decision was not overruled, but simply held to be not controlling over an action by a longshoreman—not an employee under the Jones Act—and that the Court in the *Hust* case intended to preserve the rights of seamen against general agents under the Jones Act.

This position is entirely consistent with other recent decisions by the Supreme Court of the United States involving the determination of the employer-employee relationship and holding private corporations to be "employers" for the purposes of social legislation despite the fact that such a result might not be justified by application of common law tests and that "the primary consideration in determining the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guarantees and protection afforded by the Act." See *N.L.R.B. v. Hearst Publications,* 322 U.S. 111; *United States v. Silk,* 331 U. S. 704. It has also been specifically held that an employee can hold two and even three corporations responsible as his "employers" under the Jones Act and Employers' Liability Act, upon which the Jones Act is based. *Lavender v. Kurn,* 327 U.S. 645; 90 L. Ed. 916; *Armit v. Loveland,* 115 F. (2d) 308, 313-314.

The position that the general agent is the "employer" of an injured seaman is also fully supported by the record in both the *Hust* case and the instant case. This includes the following:

(a) The Union contracts between the steamship companies, including respondent, and the Unions, including the Union of which petitioner was a member and also the Union which included the masters of the ships as members, under which the companies were designated as the employer and retained the right to hire and fire (Plf. Ex. 1, 5, 9 and 10; R. 87, 98, 106, 136 and 240; see also R. 124-130 and 166-169).

(b) Evidence that during the war these agreements were expressly continued with the approval of the War Shipping Administration and that the steamship companies continued to negotiate grievances and to act otherwise as employers of the crew, and were recognized as such by both major federal labor agencies, The National War Labor Board and the National Labor Relations Board (Dft. Ex. C; R. 107, 188 at 190; R. 87-92, 98, 101, 125-6, 130, and 166-9); see also Plf. Ex. 11; R. 143, 70; Plf. Ex. 12 and 13; R. 166, 240, and Appendix A hereof). At that time even the War Shipping Administrator made no claim that such seamen were Government employees and declined to express an opinion on the question (Dft. Ex. E; R. 108, 43, at 54).

(c) Provisions of the general agency agreement, including requirements that the crews were still to be procured by the steamship companies in the usual manner, it being specifically held by this Court in the *Hust* case that such agreements con-

tinued the employer-employee relationship between seamen and private steamship companies (see Appendix B hereof).

In view of the above evidence and the above quoted express holdings by this Court in the *Hust* and *Caldarola* cases, supra, it is submitted that any attorney would have advised a seaman injured under similar circumstances that he had a remedy under the Jones Act against the steamship company acting as general agent, subject only to the question whether a different result would be required by the language of the Clarification Act for injuries after the effective date of that Act—a question separately discussed below.

Yet in the face of this evidence and of these decisions, counsel for the Government now goes so far as to contend that such seamen are employees of the Government; that the Government had exclusive control over the operation of the ships, while its general agents were only "shoreside business agents"; that the *Hust* case was based upon a holding that the general agents were owners *pro hac vice;* that this was "modified" by a directly opposite holding in the *Caldarola* case, and that even if the general agents are employers of the crew they are not liable for injuries at sea due to the negligent operations of vessels by officers or crews not under their control (Memo by Resp. on Pet. for Cert., pp. 2-6). It thus becomes necessary to discuss these contentions.

B. *Position of Government Inconsistent with Previous Position and not supported by either Hust or Caldarola Case.*

1. Such Seamen are Employees of General Agents for Purposes of Jones Act.

It is first contended by respondent that such seamen are employees of the government, rather than of the general agents (Resp. Memo., p. 2.) But even though such seamen may technically and for some purposes be considered as government employees, the fact remains that for the purposes of the Jones Act they have been expressly held by this Court in both the *Hust* and *Caldarola* cases to be employees of the general agents (see Argument, supra, pp. .... to ....). Moreover, and as also pointed out above, it has been held that for the purposes of the Employers Liability Act and Jones Act a worker may be considered to be an employee of more than one employer. *Lavender v. Kurn*, supra, and *Armit v. Loveland*, supra. Finally, attorneys for the Government, when appearing as amicus curiae in the Supreme Court of Oregon, took the following position:

> "*Hust* was a decision in the great tradition of liberalizing the protection of maritime workers. * * * So *Hust* held that 'employer' when used in the Jones Act * * * includes 'any person acting in the interest of an employer' * * * that any agent who procured or employed a seaman in the interests of the United States might be deemed the 'employer' for the purposes of an injured seaman's bringing the statutory action under the Jones Act." (Brief for United States as Amicus Curiae, p. 10).

It is therefore submitted that there can now be no denial, at least by the Government, but that petitioner must be considered as an employee of the respondent for the purposes of this case.

2. General Agent not Mere "Shoreside Business Agent".

It is argued by the Government that under the terms of the general agency agreement the United States had exclusive control over the operation of the vessel and that the Shepard Steamship Company was a mere "shoreside business agent" (Resp. Memo, pp. 2, 3). Conceding, for the purposes of argument alone, that, in view of the *Caldarola case, Shepard* may not have exclusive control and therefore may not have been the owner *pro hac vice*, it does not follow that Shepard thereby had no control whatever over the operation of the vessel, and such is not the holding of the *Caldarola* case. Indeed the provisions of the general agency agreement alone show that the general agents had at least a substantial measure of control over the operation of such a vessel, even if not exclusive control (see Appendix C). cf. *Quinn v. Southgate Nelson Corporation*, 121 F. (2d) 190, cert. den. 314 U. S. 682.

It likewise does not follow, even if the Government was the exclusive operator, that an injured seaman is thereby deprived of his remedy under the Jones Act against the general agent for an injury caused by the negligence of a fellow seaman or officer of the ship.

In the *Hust* case (at p. 725) this Court not only held that the common law test of "control" is inapplicable in such a case, but went on (at pp. 730-3) to hold as follows:

> "The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances enough to deprive seamen of that remedy. We do not think either Congress or the President intended to bring about such a result by the transfer of the industry to temporary governmental control. If this made them technically and temporarily employees of the United States, it did not sever altogether their relation to the operating agent, either for the purposes of securing employment or for other important functions relating to it. Nor did it disrupt the long-established scheme of rights and remedies provided by law to secure in various ways the seaman's personal safety either to deprive him of those rights altogether or to dilute or reduce them to the single mode of enforcement by the Suits in Admiralty Act procedure.
>
> "This result is in accord with the spirit and policy of other provisions of the General Service Agreement. The managing agent selected the men, and did so by the usual procedure of dealing with the duly designated collective bargaining agent. It delivered them their pay, although from funds provided by the Government. It was authorized specifically to pay claims not only for wages, but also for personal injury and death incurred in the course of employment, for maintenance and cure, etc. It was responsible for keeping the ship in repair and for providing the seaman's supplies. For all of these expenditures not covered by insurance

the contract purported expressly to provide for indemnity from the Government.

"With so much of the former relation thus retained and so little of the additional risk thrown on the operating agent, it would be inconsonant not only with the prevailing law, but also with the agreement's spirit and general purpose to observe and keep in effect the seaman's ordinary and usual rights except as expressly nullified, for us to rule that he was deprived of his long existing scheme of remedies and remitted either to suit against the Government in personam in Admiralty. Our result also is in accord with the general policy of the Government and of the War Shipping Administration that those rights should be preserved and maintained, as completely as might be possible under existing law, against impairment due to the transfer."

3. *Hust* Case not based on Holding that General Agents were Owners *Pro Hac Vice* and not "Modified" by *Caldarola* Case.

The Government next states that "In the *Hust* case it was held that agents might be deemed operating agents or owners *pro hac vice*" and that this holding was "modified" in the *Caldarola case*" (Resp. Memo, pp. 4-5).

We do not presume to state the intentions of this Court. It is self-evident, however, that the majority opinion by Justice Rutledge in the *Hust* case was not based upon any theory of *pro hac vice*. Instead, it was the concurring opinion by Justice Douglas that adopted the *pro hac vice* theory of liability in the *Hust* case. It is equally self evident from the decision of this Court

in the *Caldarola* case that, while it may be inconsistent with the concurring opinion by Justice Douglas in the *Hust* case, it neither overruled nor "modified" the majority opinion by Justice Rutledge in that case. On the contrary, the *Hust* case was specifically recognized as holding that general agents are the employers of injured seamen for purposes of the Jones Act and that "a seaman could therefore bring the statutory action against such an "employer" (332 U. S. at 159).

Indeed, the Government, when appearing as *amicus curiae* in this case before the Supreme Court of Oregon, made no claim in its brief that the *Hust* case was either overruled or "modified" by the *Caldarola* case, but stated that the *Hust* case was a "great" decision in holding that the general agents are liable to injured seamen as "employers" under the Jones Act (supra, p. 12). Thus the Government, in good grace, can now hardly take a contrary position.

4. Rules of Vicarious Tort Liability no Defense under Jones Act.

The Government next contends that the "vicarious liability" of the general agents does "not extend to the negligence of the Government's masters and crews who were doing the work of the United States in the physical management and operation of its vessels "not subject to the agent's control—even if the agent "be deemed their 'employer' as regards the institution of a Jones Act suit" (Resp. Memo. pp. 5, 6). The effect of this

argument would be to admit that an injured seaman is an "employee" of the steamship company for the purpose of bringing suit under the Jones Act, but to then hold that his fellow seamen and officers are not employees of the company for the purposes of the same suit, thereby rendering his remedy wholly meaningless.

The obvious answer to this attempt at hair-splitting is that exactly the same factual situation was presented in the *Hust* case, where the injury was also the result of the negligence of the ship's officers in the operation of the vessel. In that case the Oregon Supreme Court suggested a similar distinction, based on the same authority, in holding that:

> "The defendant was not responsible for a negligent order of the boatswain which sent the plaintiff into a place of danger. * * * The defendant had no control over these events and no means of preventing their occurrence. As an agent whose duty it was merely to procure the master and crew for employment by the United States, it was not responsible for their conduct to the plaintiff (Restatement, Agency, Sec. 79, Comment A); and, since *plaintiff* was not an employee of defendant, he could in no event sue the defendant under the Jones Act." (176 Or. 662, at 695).

But from the above quotation it is clear that even the Oregon Supreme Court recognized that the application of this principle of agency depended upon the assumption that *plaintiff* was not an employee of defendant. Thus, it having been held by this Court that injured seamen are employees of the general agents for

the purposes of the Jones Act, this distinction becomes inapplicable. That any attempted distinction by regarding the injured seaman as an employee and the seaman causing the injury as not an employee, both for the purposes of the Jones Act, is pure legal sophistry is clearly indicated by his Court in the *Hust* case, which specifically rejects the common law tests of vicarious liability. (At p. 724) Indeed, that decision squarely holds that a seaman injured due to negligence in the operation of a ship operated under the general agency agreement due to the negligence of its officers can recover judgment against the general agent under the Jones Act. That this argument by the Government has already been rejected by this Court in the *Hust* case was even recognized as unescapable by the Oregon Supreme Court in this case (R. 20-23).

The whole effect of the *Hust* decision is to preserve all rights and remedies by seamen against the steamship companies, a result which could clearly be sabotaged by the distinction now urged by the Government. Moreover, one of the "uncertainties and complexities" to which the Court (at pp. 721, 722) gave direct attention and expressed a clear intent to afford relief was the following difficulty:

> "There would be other uncertainties and complexities. Were respondent's position to prevail, a seaman would be forced to predict, before instituting his suit, whether at the end of the litigation it would turn out that the cause of action alleged should have been asserted against the Government or against the private operator. Thus, *it might*

often be difficult to foretell whether the negligence alleged to have caused the injury would be attributed ultimately as the proof should turn out to some act of the master or a member of the crew, in which event only the Government, not the operating agent, would be liable, or to some default of that agent in discharging its specially limited but various duties, in which case it and at least in some instances not the Government would be responsible.

* * *

"These are at least some of the uncertainties and complexities which would result from acceptance of respondent's view. It is hardly too much to say that substantive rights would be lost in an incalculable number of cases by the disruption such an acceptance would bring for rights long settled. The result also would be to throw large additional numbers into confusion which in the end could only defeat many of them." (Emphasis supplied).

Thus it is clear beyond doubt that this alleged distinction now urged by the Government is wholly unsound, and that since the same distinction might have been urged in the *Hust* case, the decision of this court in that case is controlling on the point and, in affording recovery to seaman injured due to negligence of the ship's officers in the operation of the ship, the *Hust* case must be regarded as requiring the same result in this case.

It is also argued by the Government in this connection that the "loaned servant" rule of *Denton v. M. V. R.R. Co.*, 284 U. S. 305, forecloses recovery in this case (Resp. Memo. p. 5). But in the *Denton* case recovery was

sought, not by a fellow employee of the railroad, but by a third person, and the action was not brought under the Employers Liability Act. As held in the *Hust* case, the test for determination of the employer-employee relationship for the purposes of the Employers Liability Act and Jones Act "*involves something more than the mere application to the facts of the common law test for ascertaining the vicarious responsibilities of a private employer for the tortious conduct of an employee.*" (Id. p. 724). Thus, as held in the *Caldarola* case, the *Hust* case did not impose upon general agents "duties of care to third persons" (332 U. S. at 159).

But in this case, as in the *Hust* case, there was no "loaning" of servants, which would require a division in the duties of the employee between two employers, and, of more importance, the problem in this and the *Hust* case was not one of vicarious responsibility to third persons, which was the situation involved in the *Denton* case. The "loaned servant" argument was equally available in the *Hust* case, since the facts on that question are identical. But in the *Hust* case it was held that a general agent is liable under the Jones Act to a seaman injured by the negligence of the officer of a vessel operated under a standard general agency agreement upon the ground that the seaman was the employee of the company. Exactly the same situation is presented in this case and, under the *Hust* case, exactly the same result is required by the decision of this Court in that case. Therefore, it being admitted that the *Hust* is still the law in establishing that general agents are "employers"

of injured seamen for the purposes of the Jones Act, the plaintiff must also prevail in this case unless a contrary result is required by provisions of the Clarification Act by reason of the fact that the injury in this case took place after the effective date of that Act.

5. Points raised by Government resolved by Hust case.

In the *Hust* case the negligence alleged of the officers of the ship included failing to replace a burned out light for the boatswains' lockers, failing to maintain a guard chain or other guard around the opening to the lower locker, requiring plaintiff to work in total darkness and in an unsafe place, and failing to warn him of the dangers (see Record of *Hust case*). In this case the negligence alleged of this ship's officers was in requiring plaintiff, unassisted, to lift a heavy garbage can and dump it over the rail when there was a heavy sea running, and in failing to provide other seamen to help in this task.

In addition, it is to be noted that in this case the vessel was not equipped with a garbage chute, as used on some other Liberty ships, and which would have made it possible for one man to dump garbage without lifting heavy cans over the rail (R. 178). This, of course, might properly be chargeable as an act of negligence by the general agency under its duty to properly equip and maintain the vessel—even under the theory of the Government that it had no responsibility for the actual

operation of the vessel. Thus, the facts of this case are at least as strong, if not stronger, than the facts of the *Hust* case.

It is therefore of extreme significance that the Government has made no attempt whatever to distinguish this case from the *Hust* case upon the facts of negligence or responsibility for such negligence. It follows that since under the *Hust* case it was held that a seaman is entitled to recover under the Jones Act against a general agent for injuries received due to negligence of an officer of the ship in its operation at sea, the application of the same principle in this case requires that recovery by the plaintiff must be sustained. It also follows that the legal questions raised by the Government must be regarded as resolved by the decision in the *Hust* case, except for the question as to the effect of the Clarification Act upon claims arising after the effective date of that Act, which is next to be considered.

II. THE CLARIFICATION ACT DID NOT SEVER THE EMPLOYER-EMPLOYEE RELATION BETWEEN SEAMEN AND GENERAL AGENTS NOR DESTROY THE JONES ACT REMEDY OF SUCH SEAMEN AGAINST SUCH STEAMSHIP COMPANIES.

A. *Government Bound by Admission that Clarification Act has no Bearing on Issues of this Case.*

The Government would now reverse its previous position as to the effect of the Clarification Act (Pub-

lic Law 17, 50 U. S. C. App. Sec. 1291; 57 Stat. 45) upon the facts of this case and upon the remedies of seamen injured after the effective date of that Act. Thus, in its brief as amicus curiae before the Oregon Supreme Court, the Government, in referring to the Clarification Act, took the following position at p. 51 of that brief:

> "The language of the Act thus makes it absolutely clear that the Congress did not intend to grant new rights, or impose new liabilities against the Government's agents or alter in the slightest any rights seamen might already have against them.
> * * * *
> "It is clear that the sole intended effect of the Clarification Act was to remove all impediments to War Shipping Administration seamen's asserting their rights against the United States under the Jones Act and preserving their rights under the Social Security Acts. In return the Act discontinued their rights under the U. S. Employees' Compensation and Civil Service Retirement Acts, saving, however, such claims and causes of action as had theretofore accrued under those acts. We submit, therefore, that *the Clarification Act has no bearing on the present case.*" (Emphasis supplied)

This same admission by the Government was recognized by the Oregon Supreme Court in its opinion (See R. 32) and also in *McAllister v. Cosmopolitan Shipping Co., Inc.*, 169 F. (2d) 4, at 8.

It must also be kept in mind in considering this case that all parties to the *Hust* case were in complete agreement that the Clarification Act of itself did nothing to

change the pre-existing rights and remedies of seamen against private steamship companies and that any change in the employer-employee relationship for the purposes of the Jones Act from one between seamen and such companies to one between the seamen and the United States was to be determined solely upon the basis of the general agency agreement and the evidence relating to the war-time transfer of merchant shipping to government control, rather than upon any change required by the Clarification Act.

Thus counsel for the steamship company in the *Hust* case took the position before the Supreme Court of the United States that Public Law 17 "is merely a clarifying piece of legislation and shows, as clearly as if it had been passed before, the Congressional intent with regard to these seamen" (Resp. Br. in Opposition to Petition for Certiorari, p. 7). In further support of their position in the *Hust* case that the Clarification Act had no effect upon the employer-employee relationship, counsel took the position, speaking of the general agency agreement, that "We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel" (Resp. Br. on Merits, p. 5). Counsel also stated to the Supreme Court of the United States in the *Hust* that:

> "* * * we do not claim that Public Law 17 took away any rights of seamen in this respect. Both before and after Public Law 17, seamen employed by private employers could sue their employer under the Jones Act either by an in per-

sonam proceeding in admiralty or by an action at law with a jury trial." (Resp. Second Brief on Merits, p. 18.)

This position was likewise adopted by the Oregon Supreme Court when the question was presented to it in the *Hust* case. Thus it was held by that Court, speaking of the Clarification Act, that, if seamen on ships operated under general agency agreements were employees of the steamship companies, "no legislation was necessary to enable such seamen to sue the agent for its torts, since they already had that right under the Jones Act, *Hust v. Moore-McCormack Lines, Inc.*, 176 Or. 662, 683; that Congress in passing that statute "was content to leave the matter of agents' liability to the courts", Id. at 689; and that:

> "We do not mean to suggest that the purpose of the law was to grant to agents immunity from suit for their own torts, but simply that *it leaves the question of the agents' liability untouched.* It does not purport to create between the seamen and general agents of the War Shipping Administration a relationship of employer and employee, which, but for the Act, would not exist, nor to impose upon such agents liability for a tort which they did not commit. *The whole purpose and intent of Section I,* in our opinion, *was to create and declare in favor of seamen employed by the United States rights and remedies against the United States.*" (Idem, emphasis supplied.)

The Government of the United States, appearing as amicus curiae before this Court in the *Hust* case, took the position in its brief that:

> "Although the injury to petitioner occurred before the adoption of Public Law 17, *that Act is pertinent because it is declaratory of the previously understood law* and practice with respect to the incidence of liability for injuries, and *the decision in the present case will probably determine whether similar suits can be maintained with reference to the subsequent period as well as the period before the Act.*" (Brief of U. S. p. 2, emphasis supplied.)

and, later, that:

> "There can be no doubt that as to such suits for personal injuries to seamen on merchant vessels 'owned by or bareboat-chartered to the War Shipping Administration' the Act was viewed as declaratory of pre-existing law. (S. Rep. No. 62, 78th Cong., 1st Sess., p. 5; see also *idem* p. 11; H. Rep. No. 107, 78th Cong., 1st Sess., pp. 2, 16.)" (Id. at p. 8.)

Now, however, the Government takes the position for the first time that by the Clarification Act it was intended by Congress that as to all future claims injured seamen were to be restricted to suits against the United States and could no longer bring actions under the Jones Act against steamship companies acting as general agents (Resp. Memo. p. 7).

It is therefore submitted that the respondent is bound by the admissions previously made by the Government in this same case. See *Daitz Flying Corp. v. United States*, (E.D.N.Y.) 4 F.R.D. 372. Cf. *United States v. Continental-American Bank & Trust Co.*, 79 F. Supp. 450 at 452. If, however, this Court desires to consider

argument on the merits of this question, and without waiving this contention, petitioner submits the following.

B. *Rights of Seamen under Jones Act against General Agents can be destroyed only by Clear and Unequivocal Command.*

The respondent in this case now takes the position that simply because the Clarification Act provides that such seamen may have a remedy against the United States under the Suits in Admiralty Act they are deprived of the right to sue the steamship companies under the Jones Act. To reach such a conclusion it is apparent that this Court must hold either: (1) That the Clarification Act of itself destroyed the employer-employee relationship theretofore existing between such seamen and steamship companies, or (2) that the Act, although not destroying that employer-employee relationship, was intended to and did amend the Jones Act by destroying the rights of such employees created by that Act to bring suit against their own employers for personal injuries.

Once again it must be kept in mind that only by "clear and unequivocal command" can the employer-employee relationship between seamen and steamship companies, together with the accompanying rights and remedies under the Jones Act against such steamship companies be destroyed and that such a result is not to be found by implication. *Hust v. Moore-McCormack Lines, Inc.*, supra, at 722; *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575,

at 580-1. This is in accord with the universally accepted rule that repeals by implication are not favored.

Had Congress intended to grant immunity to general agents it would have done so in clear and unambiguous language, for, as indicated by the legislative history of the Act, Congress recognized the possibility that general agents would have an independent tort liability (see Appendix D). Instead of granting immunity from suit to general agents, Congress was scrupulously careful to so amend the existing law as to provide for insurance coverage for general agents (see Section 3(i)). This legislation obviously does not meet the test of disturbing existing rights and remedies of seamen against general agents only by "clear and unequivocal command."

This Court in the *Hust* case, supra, held that the determination that seamen employed on ships operated under general agency agreements were still employees of the steamship companies for the purposes of the Jones Act, which was reached after consideration of the problem and an analysis of the general agency agreement, was simply "confirmed" by the legislative history and provisions of the Clarification Act (Id. at 725) and that:

> "Indeed one primary occasion for enacting the Clarification Act was to save the seamen's rights in these respects rather than to take them away." (Id. at p. 726).

and, later that:

"The entire history of the Clarification Act will be read in vain, however, for any clear expression of intent or purpose to take away rights, *substantive or remedial,* of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer. Whether or not this conserving intent was made effective in the prospectively operating provisions of the Act, it is made clear beyond question in the retroactive ones. Congress was confessedly in a state of uncertaintly. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an *additional assured remedy* in case what had been preserved might turn out for some reason to be either doubtful or lost." (Id. at 733; emphasis supplied.)

It follows from these observations that in adopting the Clarification Act the Congress must have had no intent to and did not in any manner change the status of seamen employed on ships operated under general agency agreements as either employees of the private steamship companies or as employees of the United States. That question was unaffected by any provision of the Act and was left to the Courts for determination upon the basis of the pre-existing law, the general agency agreements and other evidence. As previously pointed out, that question has now been decisively determined and re-affirmed by this Court in the *Hust* and *Caldarola* cases in holding that for the purposes of the Jones Act such companies are to be regarded as the employer of the seamen engaged on such ships.

It is therefore impossible to take the position that the Clarification Act had any effect upon the status of seamen as employees of the steamship companies designated as general agents. Respondent must thus fall back upon the position that the Clarification Act was intended to deprive such seamen of their previously existing right to bring actions for personal injuries against such steamship companies under the Jones Act in state courts, with right of trial by jury. In taking this position respondent must take one or the other of two possible views of the understanding and intent of Congress in passing the Clarification Act: (1) That Congress mistakenly assumed that under general agency agreements such seamen were employees of the United States, rather than of the private steamship companies, and therefore provided only for remedies against the United States, or (2) that Congress was uncertain whether as the result of the general agency agreements such seamen would be employees of the United States or of the private steamship companies, but intended to preserve all rights and remedies of seamen intact and to protect the seamen by providing at least an assured remedy against the United States.

C. *Under any View of the Clarification Act it did Nothing to destroy the previously Existing Rights and Remedies under the Jones Act of Seamen employed on Ships operated under General Agency Agreements against Private Steamship Companies as their Employers.*

1. View that Congress mistakenly assumed seamen to be employees of the United States.

In this case the Government is apparently proceeding on the assumption that such seamen on ships operated under general agency agreements were government employees and that they were so recognized by Congress in adopting the Clarification Act (Resp. Memo. 2-6).

Moreover, the principal argument of the Government, in its brief as amicus curiae in the *Hust* case, was to the effect that both the War Shipping Administration, other government agencies, and Congress itself, as shown by the legislative history of the Clarification Act, "recognized" the "status of merchant seamen," such as petitioner in that case, "as employees of the United States" (Brief of U. S. as Amicus Curiae, pp. 4, 7 and 8).

It thus being clear that the entire assumption on which appellant's argument is based is that merchant seamen had become employees of the United States and that they were so regarded by Congress, and it having now been held by the Supreme Court of the United States that this assumption by Congress as to the legal status of merchant seamen at the time of passing the Clarification Act, if there was any such assumption, was wholly in error, the entire argument must fall. When it is assumed that Congress understood that merchant seamen had already become government em-

ployees, the statements made in the Congressional reports to the effect that the claims of such seamen for personal injuries "would be enforceable by suits against the United States under the Suits in Admiralty Act" wholly fail to support its contention that such claim were intended to be enforced *only* in that way.

If Congress assumed that merchant seamen had already become government employees, the provisions under the Clarification Act for a remedy against the United States under the Suits in the Admiralty Act were intended to be exclusive only in the sense and to the extent that the United States was the exclusive employer. In other words, the Act was intended to regulate only those actions which could be brought against the United States. Nowhere in either the Act or its legislative history, as pointed out by this Court in the *Hust* case (at p. 733), is there any expression of an intent to take away any right or remedy that such seamen might have had against private employers, and the references in the Congressional reports to the possible liability of steamship companies under the *Brady* case, supra, make this doubly clear. (See appendix D.) Therefore, it is clear beyond doubt that if this entire assumption was erroneous and if private steamship companies were either jointly or exclusively responsible as employers for the purposes of the Jones Act, as now held by this Court, then there must have been no intent to destroy the remedy of such seamen under the Jones Act against such private employers, nor was there ef-

fective statutory language of the "clear and unequivocal" nature required to make any such intent effective, as required by the *Hust* and *Brady* cases, supra.

If counsel should ask in reply what purpose Congress could have had in adpting the Clarification Act if this be true, since seamen employed by the United States already had such a remedy against the Government under the Suits in Admiralty Act, the answer, as already demonstrated above, is that the Clarification Act was not intended to change or destroy any pre-existing rights or remedies between seamen and steamship companies, but only to be declarative of previously existing rights and remedies against the Government. As to any further intended effects, the language of counsel for respondent in the *Hust* case, as stated to this Court, is perhaps the most appropriate answer:

> "Public Law 17 did not change any of these rights. All it did was (1) to extend the *same* rights of seamen on *merchant* vessels of the United States to seamen on *public* vessels of the United States, and (2) to require administrative disallowance of the claim before filing suit, in order 'to prevent unnecessary or premature litigation against the United States.' (House Report, p. 21.)
>
> "Therefore, we do not claim that Public Law 17 took away any rights of seamen in this respect. Both before and after Public Law 17, seamen employed by private employers could sue their employer under the Jones Act either by an in personam proceeding in admiralty, or by an action at law with a jury trial. And seamen who were employees of the Government on merchant vessels could enforce their substantive rights under the

Jones Act only under the Suits in Admiralty Act." (Emphasis supplied; Resp. 2nd Brief on Merits, pp. 17, 18.)

See also the position taken by the Government in the Oregon Supreme Court in this case as to the intended effect of the Clarification Act (Supra, p. 26).

2. View that Congress was uncertain as to the status of merchant seamen, but intended to preserve all their rights and remedies and to provide at least an assured remedy against the Government.

Contrary to the view set forth above to the effect that Congress assumed at the time it enacted Public Law No. 17 that merchant seamen had already become employees of the United States and based the statute upon that assumption, is the view adopted by the Supreme Court of the United States in the *Hust* case, supra. Thus the Court, speaking through Justice Rutledge, held that "*Congress was confessedly in a state of uncertainty*" (Id. at 733; emphasis supplied), and that "* * * * Congress did not enumerate the specific rights which it considered seamen to have prior to the Clarification Act and after the industry transfer to government control. To have done so, in view of its own *uncertainty* in this respect, including the effects of the *Brady* decision, would have been hazardous." (Id. at 730; emphasis supplied.) Similarly, it was held that:

> "Indeed one primary occasion for enacting the Clarification Act was to save the seamen's rights in these respects rather than to take them away.

"It is true there was great concern for fear that those rights had been lost or seriously attenuated by the transfer to government control, particularly during the earlier stages of Congressional consideration when the *Brady* decision had not removed the large cloud cast over them by the *Lustgarten* ruling. Nor did *Brady* remove all of the doubt in the minds of those sponsoring the bill, as the committee reports during the later stages of consideration disclose. *Hence, to make certain that the seamen would have at least the remedy provided by the Suits in Admiralty Act for enforcement of his substantive rights, as well as to take care of other important matters not affecting them, the bill proceeded to enactment.*" (Id. at 726; emphasis supplied.)

This view is fully supported by the legislative history of the Act, for, as stated in House Report No. 107, 78th Cong., 1st Sess., p. 3:

"*The basis scope and philosophy of the measure is to preserve private rights of seamen* while utilizing the merchant marine to the utmost for public wartime benefit. Except in rare cases the ships themselves are being operated as merchant vessels, and are therefore subject to the Suits in Admiralty Act. Granting seamen rights to sue under that Act is therefore entirely consistent with the underlying pattern of the measure." (Emphasis supplied.)

Even the War Shipping Administration was uncertain as to whether merchant seamen had become employees of the United States, as shown by the fact that in correspondence with the National Labor Relations Board as late as November 9, 1943, the War Shipping Administration declined to take a definite position on

this question (R. 53, 54). Moreover, the chairman of the War Shipping Administration, in a statement read at the hearings on the Clarification Act, testified that " * * * it would be best to maintain the status of seamen as private employees with respect to such matters" (Hearings before Committee on Merchant Marine, etc., on H. R. 7424, 77th Cong., 2nd Sess. p. 14). He also recognized that the general agents might have an independent liability (Id. at p. 17).

In addition, the denial to such seamen, even before the passage of Public Law 17, of the benefits of the United States Employees Compensation Act and Civil Service Retirement Act, shows that they were not regarded by other government agencies as exclusively government employees as of the date of passage of Public Law 17 (House Report No. 107, supra, p. 2). Attention has been called to the fact that they were not so regarded by the National Labor Relations Board and National War Labor Board (see Appendix A).

Therefore, since Congress was in a state of uncertainty as to the status of such seamen and intended primarily to preserve their private rights, it must follow, under this view of the Clarification Act, that there could have been no Congressional intent to destroy the remedy of such seamen under the Jones Act to bring suit in state courts, with right of trial by jury, against the steamship companies who had been designated as general agents and have since been held to be their employers for the

purpose of that Act. At the least there was not "clear and unequivocal" expression of any such intent.

D. *Retroactive Provisions of Clarification Act do not change this Result.*

The principle remaining question under the Clarification Act is whether its retroactive provisions impinge upon its prospective effect, for, as pointed out by counsel, the Court expressly stated in the *Hust* case, supra, that:

> "We need not determine in this case whether prospectively the Clarification Act affected rights of the seamen against the operating agent and others, or simply made sure that his rights were enforceable against the Government. We make no suggestion in that respect. For this case, on the facts, is not governed by the statute's prospective operation." (Id. at 727.)

The Oregon Supreme Court held that simply because the retroactive provision of the Act provided that for claims accruing between October 1, 1941, and March 24, 1943 (the effective date of the Clarification Act), injured seamen had an election whether to sue the Government under the provisions and procedure established by the Act, it must follow that the Act had the intended effect of foreclosing all actions against private steamship companies after it became effective (R. 31).

If the Clarification Act had provided a *new* remedy not theretofore in existence, such an argument might have some force. But where, as conceded in this case, the statute was merely declaratory of previously exist-

ing rights, and since at the most it sought to provide to injured seamen the benefit of an assured remedy against the Government which they would have had in any event if employees of the United States, the same argument is not convincing.

Before this Court can accept such an argument it must find that the simple expedient of extending retroactively the assured remedy against the Government was intended to and did constitute a "clear and unequivocal command", within the meaning of the *Brady* and *Hust* cases, either that from thence forward the employer-employee relationship theretofore existing for the purposes of the Jones Act between merchant seamen and steamship companies was to be destroyed by legislative fiat alone or that the Jones Act was to be amended to deny to such seamen the remedy guaranteed by that Act against those who were their employers for the purposes of that Act.

As demonstrated above, it is now established law that merchant seamen engaged on ships owned by the War Shipping Administration and operated under general agency agreements by private steamship companies are the "employees" of such companies for the purposes of the Jones Act. As also pointed out above, the Clarification Act was intended to save and protect the rights and remedies of merchant seamen, and not one word of its legislative history or of its provisions can be honestly interpreted as intended to have either of the far-reaching effects necessary to support the argument of appel-

lant in this case or to constitute a "clear and unequivocal command" to either of those effects.

It is only by *implication* of the most strained sort that such an effect can be found and, as held in the *Brady* and *Hust* cases, the basic rights of merchant seamen are not to be taken away by mere implication. As held by the Supreme Court of the United States, the right to jury trial in a state court alone is "part and parcel" of the remedy afforded under the Employers Liability Act and Jones Act and to deprive a worker of the benefit of jury trial is to take away "a goodly portion of the relief which Congress has afforded them". *Bailey v. Central Vermont Ry.*, 319 U. S. 350, 354.

It therefore follows that neither the provision by the Clarification Act of an assured remedy to merchant seamen against the United States under the Suits in Admiralty Act nor the extension of such benefits retroactively to October 1, 1941, could have the effect of depriving merchant seamen of their rights under the Jones Act against private steamship companies—a matter which was then uncertain in the minds of Congress because of the then undetermined effects of the transfer of the merchant marine to government ownership, but which was at least considered and protected by Congress in passing the Clarification Act, as shown by its legislative history, and which has since been recognized by this Court in the *Hust* case and reaffirmed in the *Caldarola* case.

E. *Denial of Jury Trial in Suits against Government does not destroy Right of Jury Trial against Steamship Companies.*

The Oregon Supreme Court apparently relied, at least to some extent, upon the fact that Congress expressly considered a request by the C.I.O. that jury trials be allowed in suits by such seamen against the Government, as provided under the Clarification Act, and deliberately decided not to allow a jury trial in such proceedings (R. 29). It is natural that the C.I.O. be concerned lest seamen lose their valuable right of trial by jury, particularly since Congress, according to respondent, understood that merchant seamen might have become employees of the Government. But what the C.I.O. wanted and what the Attorney General advised against was not the continued allowance to merchant seamen of their right to trial by jury against private employers, *but a right of trial by jury against the Government* in order to fully preserve both seamen's rights and remedies under the Jones Act, even though they might have become government employees. This is clear from the statement, in the first paragraph of the letter of the Attorney General, that "the suggestion was presented on behalf of the N.M.U. that an action at law with jury trial should be afforded seamen where claims are presented *against the United States* * * *," and, in Section (3) of the same letter, that Congress has rarely allowed a jury trial against the United States" (H. R. 7424, Hearings, supra, p. 33, filed by appellant with its brief). This interpretation was wholly concurred in by counsel

for the steamship companies before the Supreme Court of the United States in the *Hust case*, in which they agreed that Public Law 17 did not take away the right to jury trial of a privately employed seaman but only declined to grant a similar right in actions against the Government (Resp. Second Brief on the Merits, p. 20; see also House Report No. 2572, p. 14).

F. *Provisions that Remedy against Government "shall" be under Suits in Admiralty Act not destructive of Rights and Remedies against Steamship Companies.*

The Oregon Supreme Court also considered it to be of some importance that Section 1 of the Clarification Act provided that claims by seamen for personal injuries "shall" be enforced under the Suits in Admiraty Act (R. 29).

As also pointed out above, the Clarification Act did nothing to take away any pre-existing rights of merchant seamen (see also *Hust* case, supra, at p. 733), but was intended to conserve all such rights despite the confusion resulting from the war-time transfer of merchant shipping to government control and, at the least, to provide an assured remedy against the Government under the Suits in Admiralty Act (Id. at pp. 726, 727).

The provisions of Section 1 of that Act show beyond doubt that the entire contents of that section were based upon the assumption, although recognized by Congress

to be doubtful, that such seamen may have become, at least technically and for some purposes, employees of th Government by virtue of the war-time transfer of merchant shipping to government control and that a remedy against the Government should therefore be provided. Since, however, it has now been held that at least for the purposes of the Jones Act private steamship companies are still responsible as the employers of such seamen, and in view of the conserving intent of Congress in passing that Act and the absence of any clear expression of an intent to destroy that relationship or the rights created thereby, it must follow that Section 1 of the Clarification Act is to be considered solely as it concerns the remedies of such seamen against the United States and as exclusive in that sense only. By the same token, Section 1 cannot be considered as indicating any intent to destroy or exclude the rights and remedies of such seamen against private steamship companies, which could only be destroyed by clear and express language nowhere set forth in Section 1 or otherwise in the Clarification Act.

Thus the provisions of Section 1 of the Clarification Act requiring that any claim, if administratively disallowed, *shall* be enforced under the provisions of the Suits in Admiralty Act, must be taken as referring only to the prosecution of such claims as against the Government, rather than as intended to destroy the rights of seamen who may have still been employees of private

steamship companies for the Jones Act to bring direct action against such employers.

That such is the proper interpretation of Section 1 is further confirmed by the fact that the following provision of Section 1 allows such a remedy "notwithstanding the vessel * * * is not a merchant ship * * * ", thereby extending the provisions of the Suits in Admiralty Act to seamen injured on "public vessels". This fully explains the use of the term "shall". In other words, this provision means nothing more than that merchant seamen *shall* be entitled to the benefit of the Suits in Admiralty Act for claims for personal injuries even though employed on public vessels.

A further explanation of the requirement that such claims against the Government "shall" be enforced under the Suits in Admiralty Act is to be found in the following language of Senate Report No. 62, supra:

> "It is the spirit and intent of section 1 to avoid possibilities of double recovery which might otherwise arise if a seaman pursued his rights under section 1 and then attempted to pursue comparable rights or such recovery for the same or similar events under other law or provision; and, on the other hand, which might arise with respect to retroactive rights which the claimant elects to pursue as if section 1 was in effect at the time of accrual of the claim.
>
> "The effect of this legislation is to eliminate the danger that seamen may recover both against the Federal employees' compensation fund and under his statutory or common-law remedies for the same

injury." (Senate Report No. 62, p. 12, 78th Cong., 1st Sess.)

With such expressed and natural meanings as set forth above there is no room for the strained implication that the single word "shall" was intended to strip injured seamen of their long established rights to bring actions in state courts against such steamship companies as might be held by the courts to be their employers for the purpose of the Jones Act.

Furthermore, it is to be noted that the Chairman of the War Shipping Administration, in a letter included in the Congressional reports referring to this section *did not state that such claims could only be enforced by suit against the United States under the Suits in Admiralty Act.* Instead, we find the statement that:

> "The claims would be enforceable by suit *against the United States only* under the Suits in Admiralty Act." (House Report No. 2572, p. 29, 77th Cong., 2nd Sess.)

It is thus further apparent that the Clarification Act was only intended to deal with the remedies of seamen against the United States and that it was in that sense alone that the remedy under the Suits in Admiralty Act was meant to be exclusive, rather than that there was any intent to destroy the rights of seamen against private steamship companies, which were at all times intended to be fully preserved.

In other words, as held by this Court in the *Hust* case, at p. 733, the object of the Clarification Act was not to

provide that the remedy against the Government was to be an exclusive remedy, as now contended by respondent, but was to preserve all rights and remedies and "to provide an *additional assured remedy* in case what had been preserved might turn out for some reason to be either doubtful or lost".

G. *Weight of Authority supports Petitioner and is opposed to Decision by Oregon Supreme Court.*

The decision by Judge Augustus N. Hand, speaking for a unanimous Court, in *McAllister v. Cosmopolitan Shipping Co.* (C.C.A. 2nd), 169 F. (2d) 4, now pending decision by this Court, is, we submit, a correct statement of the liability of a general agent and of the effect of the Clarification Act upon claims arising after the effective date of that Act. In referring to the *Hust* case, it was held by that Court, at p. 8, as follows:

> "The opinion expressly disclaimed any intention of dealing with liability for prospective acts of negligence, but the theory of liability which it adopted seems to be equally applicable to such acts. The Clarification Act, however, makes no reference to the liability of a general agent and we cannot see why it should be thought to eliminate such liability, if it existed. Moreover, it is to be noted that the Government in its brief as *amicus curiae* makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery. We believe that the purpose of the Act was to clarify the right against the United States of seamen employed by the War Shipping Administration and not to disturb other rights of seamen against the general agents so far as they existed."

As held by Judge Coleman in *Cohen v. American Petroleum Transport Corp.* (City Ct. N. Y.), 1947 A.M.C. 336, at 337, 338, in speaking of the Clarification Act:

> "* * * it is plain from a reading of the statute itself and without the aid of the committee reports that what was intended to be fixed was the liability of the government toward the seamen; the rights and obligations of seamen vis-a-vis the government were alone in question. The statute provided that because of the temporary wartime character of their employment by the War Shipping Administration, seamen 'employed * * * as employees of the United States through the War Shipping Administration' were 'not to be considered as officers of employees of the United States for the purposes of the U. S. Employees Compensation Act, * * * the Civil Service Retirement Act,' etc. They were, however, to 'have all of the rights * * * under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels,' that is to say, among other rights, those under the Jones Act. And those rights could only be enforced in admiralty under the Suits in Admiralty Act. Is it not clear that Congress was speaking only of seamen who, it thought, were employees of the United States and only of the obligations which the United States as employer owed them? * * * Yet the fact is that the liability of the operators is in no way touched in the statute. Their obligations to the members of the crew therefore remain as they were without reference to it; and by virtue of the *Hust case* they are liable under the Jones Act."

Another interesting discussion of the "Election Clause" of the Clarification Act is set forth in *Little v.*

Moore-McCormack Lines, Inc. (Sup. Ct. of Baltimore, Md.), 1948 A.M.C. 1337, at 1348, as follows:

"In my opinion, the meaning of the Election Clause is far less abstruse than is indicated by the discussion which it has been given. The rights of privately employed seamen against private employers were not and had not been either in doubt, or the subject of any controversy; they were under Social Security, and they could sue their private employers under the Jones Act. Nor was there any doubt, after the *Brady case*, that if a seaman had rights against both the United States and a private person, he could enforce both. What were in great doubt were the rights of seamen employed by the United States, both on public and on merchant vessels, *against the United States*. The object of the Election Clause was therefore merely to provide that during the period between October 1, 1941 and March 24, 1943, the seamen had an election to make claims against the United States either (1) under the U. S. Compensation Act and the other Acts applicable to Government employees; or (2) under the Clarification Act *i.e.*, for Jones Act rights through Suits in Admiralty Act procedure. There was *no need to define rights against private employers, and the Clarification Act has no bearing upon who is or is not an employer.*"

Other decisions, representing the decided weight of judicial authority, are in accord with the proposition that such seamen may sue general agents under the Jones Act, with right of trial by jury, for claims arising after the effective date of the Clarification Act. *Warren v. U. S.*, 75 F. Sup. 210; and 76 F. Sup. 735 (S. D. N. Y., J. Medina); *Healy v. Sprague S.S. Co.*, 76 N.Y.S. (2d) 564; *Guay v. American Presidents Line*

(Calif.), 184 P. (2d) 539; *Miller v. Wessel, DuVall and Co.* (S.D.N.Y.), 1947 A.M.C., 429; *Bennett v. Willmore S.S. Corp.* (S.D. Tex.), 69 F. Sup. 427; *Koistinen v. American Export Lines, Inc.*, 1948 A.M.C. 1464; *Casey v. American Export Lines* (J. Alfred C. Coxe, S.D.N.Y. Dec. 17, 1947), unreported.

CONCLUSION

This is a case in which the Government, at the last moment, has assumed the defense of a case in an attempt to protect private steamship companies from liability and to destroy the long established right of seamen employed on ships operated under general agency agreements to bring suit under the Jones Act against such companies in state courts, with right of trial by jury. The Government, which first, and even after the *Caldarola* decision, acclaimed the decision of this Court in the *Hust* case as a decision "in the great tradition of the Jones Act; a natural link in the process of liberalizing the protection of maritime workers" (Gvt. Amicus Curiae Br. in Ore. Sup. Ct., p. 10), now contends that the *Hust* case should be regarded as having been overruled by the *Caldarola* case.

But instead of overruling the *Hust* case, this Court in the *Caldarola* case expressly recognized that it was established by the *Hust* case that such general agents are liable to such seamen as their employers under the Jones Act. The next line of defense by the Government, without distinguishing the facts of this case from those

of the *Hust* case, has been to offer legal arguments which were equally applicable to the facts of the *Hust* case and must therefore be considered as resolved by the decision of this Court in that case.

Finally, the Government, after first admitting and conceding that the Clarification Act did not "alter in the slightest any rights seamen might have" against general agents and that it "has no bearing on the present case" (Gvt. Amicus Curiae Br. in Ore. Sup. Ct. p. 51), now contends that it was intended to destroy the previous remedy of such seamen against such general agents under the Jones Act. But, as demonstrated above, this result can only be reached if the Clarification Act either destroyed the previously existing relation of employer-employee between such seamen and steamship companies, as recognized to exist in the *Hust* case, or else repealed the Jones Act solely by implication so as to destroy the previous remedy under that Act by such seamen against such companies. But, as recognized by this Court in the *Brady* and *Hust* cases, such rights and remedies can only be destroyed by clear and unequivocal command, whereas the Clarification Act was intended only to provide an *additional* assured remedy against the Government and not to destroy any pre-existing remedy against the steamship companies.

Thus the Government would now lend its hand to again resurrect the doctrine of the *Lustgarden* case, *Johnson v. Fleet Corp.*, 280 U. S. 320, which limited the remedy of such seamen to proceedings under the Suits

in Admiralty Act against the Government — without right of trial by jury—a doctrine first rejected by this Court in the *Brady* case and more recently expressly condemned in the *Hust* case.

It has been recognized by this Court that the right to jury trial is "part and parcel" of the remedy afforded under the Jones Act and that to deprive workers of the benefit of a jury trial is to take away "a goodly portion of the relief which Congress has afforded them". *Bailey v. Central Vermont Ry.*, 319 U. S. 350. See also *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35.

Yet the Government now contends for a result under which thousands of American seamen will be deprived of their rights to bring suit in state courts under the Jones Act, with the guaranty of trial by jury, against the large proportion of steamship companies now operating under standard agency agreements.

The plaintiff in this case has been willing to incur the expense and delay of protracted litigation and to undergo the "uncertainties" and the difficulties in foretelling his proper remedy, as recognized in the *Hust* case (at p. 721) to be a reason for preserving the remedy under the Jones Act of seamen employed on ships operating under general agency agreements against steamship companies. If it is now held by this Court that he has mistaken his proper remedy, he will be barred by the Statute of Limitations from bringing suit against the Government under the Suits in Admiralty Act. He has

been awarded by a jury a verdict of $9,000.00. It has been stipulated that the amount of this verdict is sustained by the evidence of damages and the extent of his injuries (R. 187). It is a fair verdict and should be reinstated.

Respectfully submitted,

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APPENDIX A

In the briefs submitted to this Court in *Hust v. Moore-McCormack Lines, Inc.*, supra, the following arguments, among others, were made on the issue of whether seamen engaged on ships operated under general agency agreements were employees of the steamship companies or of the United States and are likewise applicable in this case:

> "The record shows that at the time of the accident in this case respondent company was under at least five collective bargaining agreements with various unions, all of which designated the Moore-McCormack Lines, Inc. (of the Pacific Republic Lines, its prototype on the Pacific Coast, R. 161), as one of the "employers" (see Ex. 14, 15, 18, 19, 20; admitted R. 114, 115). It is true that subsequent to the execution of these contracts the unions signed a so-called "Statement of Policy", setting forth Section 3A(d) of the General Agency Agreement, "freezing" the terms of union contracts for the duration of the war, agreeing that the unions should "cooperate" with the War Shipping Administration in maintaining discipline aboard ship and not exercise their right to strike (see R. 167-168). Nothing in this statement indicated, however, that this statement was to be anything more than indicated by its title, namely, a mere expression of policy. There was nothing to indicate that the W.S.A. was to be substituted for the companies as the employer under the union contracts, and it was made clear not only that the crews would be procured by the agents in the usual manner, but that disputes should be settled by collective bargaining between the companies and the unions as set forth in their agreements (Iden).
>
> "As stated in the *Moss* case, supra, (*Moss v. Alaska Packers Assoc.*, 1945 A.M.C. Vol. 4, 493),

in holding that under the general agency agreements the crews continued to be employees of the steamship companies, and in commenting upon this 'Statement of Policy':

> "'The Statement of Policy announced by the War Shipping Administration, in explanation of that part of the service agreement, having to do with the hiring of merchant seamen, specifically provides that agreements between unions and private ship owners be continued and that seamen be employed pursuant to such agreements.'

"Conclusive evidence of the fact that neither this Statement of Policy nor the General Agency Agreement itself changed the employer-employee relationship previously existing between the steamship companies and union members is to be found in the fact that the companies and unions continued to bargain as employer and as employee representatives. Thus these parties proceeded later to negotiate supplemental agreements for overtime pay to seamen (see Ex. 15, p. 64, R. 114; Ex. 20, p. 20, R. 115); (see also Ex. 14, pp. 33-35). In addition * * * the National War Labor Board continued to take jurisdiction over disputes between the companies and unions and to regard the companies as the employers of the crews" (Brief in Support of Pet. for Certiorari, pp. 40-42).

And elsewhere in said brief:

"We * * * think it to be of extreme significance that the two principal federal labor agencies with jurisdiction over labor problems involving seamen and which have no jurisdiction over employees of the government have apparently taken the uniform position that under such General Agency \greements the steamship companies continue to be the employers of the crews. Thus a panel of the National War Labor Board in the case of *Atlantic &*

Gulf Coast Agents and Pacific American Assn., 16 W.L.R. 23, May 6, 1944, involving some 35 companies, including the Moore-McCormack Lines, was confronted with the objection by the companies that the Board had no jurisdiction for the reason that 'the United States, not the general agents, is the employer * * * '. The panel pointed out that the W.S.A. had directed the steamship companies to negotiate contracts with the unions and that the N.L.R.B. had ruled that a general agent of the W.S.A. is the employer of the crews. Despite objection by the companies, the Board adopted the panel report and assumed jurisdiction over the case, deciding, among other things, that seamen remained subject to discharge by the agent steamship companies if not satisfactory to the companies, as well as fixing wages and working conditions to be adopted by the companies and unions as parts of their working agreements. Since then the War Labor Board has made several other decisions in disputes between the same steamship companies and the unions and has made further changes in wages and working conditions. For example, see *Pacific American Shipowners Assn.*, 14 L.R.R. 814 and 16 L.R.R. 790.

"Likewise, in the National Labor Relations Board case of *Barge Carriers, Inc.*, Case No. 10-C-1382, reported in *Lawyers Guild Review*, March-April issue, 1944, at page 38, the companies set up a similar defense, but the examiner held as follows:

> "'The acquisition by the W.S.A. of the vessels and the execution of the General Agency Agreement effected no change in the relationship between the respondent and the employees here concerned. Nor, despite the control exercised by the W.S.A. over the sailings and cargo of the vessels, has there been any change in, or attempt by the W.S.A. to change the working

conditions of the employees. Realistically, it is plain that the labor policies concerning these seamen are controlled entirely by the respondent, under only minimal supervision of the W.S.A. The creation of the W.S.A. and the vesting in it of control over the shipping of the United States was a temporary measure designed to utilize more effectively such shipping for the prosecution of the war. The control exercised by the W.S.A. over the respondent's operations has been concerned largely with voyages and cargo, and not with labor relations. In excepting the United States as an employer from the application of the (N.L.R.) Act, the Congress cannot have intended the exception to apply to a situation in which, for all practical purposes, the essential elements of the employer-employee relationship remain in the control of the private operator, under only nominal aid and temporary supervision of the W.S.A.' (Id. pp. 38-39).

As further stated in a later brief:

"Respondent states that the collective bargaining agreements with the unions were made when the company 'actually was an employer,' and that the War Shipping Administration 'modified them, insofar as employment was concerned', by the Statement of Policy, which referred to Section 3A(d) of the agency agreement.

"Since the Statement of Policy expressly continues in effect each and every provision of the union contracts between the unions and the companies, which were still to at least 'procure' the crews, it would follow that this would include a continuance of the employer-employee relationship unless it can be said that Article 3A(d) so clearly provided to the contrary that by accepting the

It is to be noted that the term "operation" is used without qualification along with maintenance and other duties imposed on the agent and ordinarily performed in connection with the operation of ships (see R. 54, 61, 62).

Article 6 deals with the selection of agents by the general agent and with the assignment of vessels by it to berth operators (R. 62). If the agent did not have at least some part in the control and operation of the vessels it obviously could not assign them to others. Moreover, the authority to select agents can have no meaning except in the discharge of the duties of the general agent under the contract, and there is thus no reason why it should not have designated agents among the officers of the ship, including at least the captain and purser, to discharge its duties while at sea or abroad.

Article 14 imposes the duty to maintain the vessel in an efficient state of repair and to exercise reasonable diligence in making inspections for that purpose (R. 67). No qualification is made to relieve the agent of this duty while the vessel is on voyage. The term "maintain" of itself connotes a continuing duty as is one normally incident to the operation of a ship.

Article 16 provides that the agent shall be indemnified for claims, including personal injuries, "connected with the operation or use of said vessels" (R. 67). Similarly, Article 8 provides for insurance of the agent against insurable risks of all kinds (R. 63). Even if it

be held that a provision for indemnity or insurance is not an admission of liability, it must be conceded that this provision could have no meaning unless the agent were intended to have at least some part in the operation of the vessel.

Merely because such operations are to be conducted in accordance with strict wartime Government orders and regulations cannot of itself defeat the responsibilities of the agent in connection with such operations any more than for any private company operating in time of war with Government owned equipment and under Government supervision. Likewise, the mere fact that the master is to have full control and responsibility for the "navigation and management of the vessel", as provided in Article 3A(d), does not contradict this fact, for the reason that under maritime law the master of a ship always has this power and responsibility, regardless of the person liable as owner or operator of the ship in the event of accident. Such a provision is even more natural in time of war and, if it has any special meaning, must have been intended to refer to laying the ship's course and to navigational problems arising under wartime conditions. Thus, such a provision is wholly immaterial to the issues of whether the agent was to take at least a substantial part in the operation of the ship.

This conclusion is even more conclusively established by Articles 11 and 12, dealing with termination of the contract, and which provide that the Government may

Administration include the power to cover the agents as well as the owners or charterers of the vessels. It has always been assumed that the agents do not have a liability which is separate or independent of that of the vessel owner or charterer. However, some recent decisions have given rise to the possibility that some agents may have an independent liability (*Quinn v. Southgate Nelson Corporation,* 121 F. (2d) 190 (C.C.A. 2d, 1941), certiorari denied, 314 U.S. 682; *Margaret M. Brady v. Roosevelt Steamship Company, Inc.,* 128 F. (2d) 169 (C.C.A. 2d, 1941). At the present time the War Shipping Administration may provide insurance for the interests of the owners or charterers of the vessels. The right to include the interests of agents is not specifically mentioned in the law but is believed to be implied therein. In view of the possibility that agents may have an independent liability it is desirable to amend section 3b of Public 101, Seventy-seventh Congress, to specifically include agents among those entitled to coverage under the Administration's insurance powers."

In Senate Report 62, 78th Congress, 1st Session, page 17, the following appears:

"Subsection (j) of section 3 would make it clear beyond controversy that the War Risk Insurance Act includes authority to provide insurance protection for agent operators as well as owners or charterers of vessels. The recent determination of the Supreme Court of the United States in *Margaret M. Brady v. Roosevelt Steamship Company, Inc.* (No. 269, October term, 1942, January 18, 1943), holds that there is such an independent liability in certain cases."

Statement of Policy embodying that article the unions expressly agreed to an abandonment of this relationship with the companies. As we have seen, however, no agreement by the unions to abandon this basis of the long established rights of their members under the Jones Act can be found in this masterpiece of legal equivocation (Pet. Br. 33-35; 41-43)." (Petitioner's Reply Br. pp. 11-12).

As held by this Court in the *Hust* case, however, the General Agency Agreement, including Article 3A(d), did not sever the employer-employee relationship between seamen and the private steamship companies (see Appendix B hereof).

APPENDIX B

In *Hust v. Moore-McCormack Lines, Inc.*, supra, counsel for the steamship companies took the following position before this Court relative to the General Agency Agreement:

"That Service Agreement is the one which determines the status of the respondent Moore-McCormack Lines, Inc., in this case and defines its relationship to the vessel. We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel" (Respondent's Brief on the Merits, p. 5).

Having thus placed "all its eggs in one basket", figuratively speaking, it is of extreme significance to note the interpretation placed by this Court on this agreement in the *Hust* case, at pages 730 to 733, as follows:

"The mere fact that the terms of the standard agreement were changed to omit the provision for manning the ship and substitute the provisions relating to employees contained in the General Service Agreement was not, in these circumstances, enough to deprive seamen of that remedy. We do not think either Congress or the President intended to bring about such a result by the transfer of the industry to temporary governmental control. If this made them technically and temporarily employees of the United States, it did not sever altogether their relation to the operating agent, either for purposes of securing employment or for other important functions relating to it. Nor did it disrupt the long-established scheme of rights and remedies provided by law to secure in various ways the seaman's personal safety, either to deprive him of those rights altogether or to dilute or reduce them to the single mode of enforcement by the Suits in Admiralty Act procedure.

"This result is in accord with the spirit and policy of other provisions of the General Service Agreement. The managing agent selected the men, and did so by the usual procedure of dealing with the duly designated collective bargaining agent. It delivered them their pay, although from funds provided by the Government. It was authorized specifically to pay claims not only for wages, but also for personal injury and death incurred in the course of employment, for maintenance and cure, etc. It was responsible for keeping the ship in repair and for providing the seaman's supplies. For all of these expenditures not covered by insurance the contract purported expressly to provide for indemnity from the Government.

"With so much of the former relation thus retained and so little of additional risk thrown on the operating agent, it would be inconsonant not only with the prevailing law but also with the agree-

ment's spirit and general purpose to observe and keep in effect the seaman's ordinary and usual rights except as expressly nullified, for us to rule that he was deprived of his long existing scheme of remedies and remitted either to none or to a doubtful single mode of relief by suit against the Government in personam in admiralty. Our result also is in accord with the general policy of the Government and of the War Shipping Administration that those rights should be preserved and maintained, as completely as might be possible under existing law, against impairment due to the transfer."

APPENDIX C

The following analysis of the standard general agency agreement demonstrates that the general agent had at least a substantial measure of control over the operation of the vessel.

Article 1 states that the general agent shall "manage and conduct the business of the vessels assigned to it," making it clear that, although acting as agent, the physical possession of the ships is turned over to the steamship company (R. 58).

Article 2 is to the same effect. It speaks also of the assignment of vessels to the agent and its acceptance of such vessels, making further clear an intent to transfer physical possession of the ships (R. 58).

Article 3A(a) imposes on the agent the duty of maintaining the vessel, subject to orders as to voyages, cargoes, rates and all matters connected with the use of the vessels or in the absence of orders to follow rea-

sonable commercial practice (R. 58). This makes it even clearer that the agent is to take at least a substantial part in the operation of the ship, subject only to orders from the Government, and that it was to exercise its discretion in the absence of such orders. Reference to "voyages" and to "use of the vessels" could have no meaning aside from operations during voyages.

Article 3A(d) provides that the general agent shall procure the master, subject only to approval by the Government (R. 59). Thus the agent is left free to designate its own employees as masters, remove them if they are not satisfactory and appoint successors, provided only that the successors are approved by the W.S.A. The fact that the master is to become an employee of the United States does not mean that he cannot at the same time be an agent for the company. Indeed, as a practical matter, the company could not discharge its duties under the contract, as discussed below, unless the master were its agent for these purposes.

Articles 3A(c), 4(a) and 7 refer to the maintenance of the vessels by the general agent, the keeping of records by it of the management, operation, conduct of business of such vessels, including statements of operation, and also provide that the Government shall reimburse the agent for all expenses, with certain limited exceptions, including expenses for the maintenance, management, operation or the conduct of the business of the vessels.

terminate the agreement and "assume control" of the ships, and that the ships "in the custody of the general agent pursuant to this agreement" shall then be "turned over" to the United States, although the agent may be required to complete the business of voyages commenced prior to the date of termination (R. 65). These provisions make clear the intent that until such time control over the physical custody of the ships was to be vested in the agent company. If the ships were being exclusively operated by the Government and not by the agent, the agent would not have their physical custody and could not "turn them over" to the party which was already operating them. Moreover, the provision that the agent may be required to complete the business of voyages undertaken prior to termination shows a clear recognition of this fact.

This conclusion is likewise supported by reference to the collective bargaining agreements between the steamship companies and Unions under which the companies assumed rights and duties that necessarily assumed that they were to take at least a substantial part in the operation of the ships at sea (see Plf. Ex. 1, 5, 6, 7, 8, 9 and 10, and Dft. Ex. A, included in the record, but not printed, R. 240).

APPENDIX D

In H. R. 7424, 77th Congress, 2nd Session, Hearings on the Merchant Marine Omnibus Bill, September 2, 1942, the report of the hearings before the Committee on the Merchant Marine and Fisheries, page 17, the fol-

lowing appears as the statement of Admiral Emory S. Land, Administrator, W.S.A.; read by Mr. Radner:

"However, some recent decisions have given rise to the feeling that some agents may have an independent liability. At the present time the War Shipping Administration may provide insurance for the interests of the owners or charterers of the vessels while the right to include the interests of agents is not specifically mentioned in the law. In view of the possibility that agents have been said to have an independent liability which may not be covered by existing insurance it is desirable to amend section 3b of Public 101, Seventy-seventh Congress, to specifically include agents among those entitled to coverage. Section 3d of the proposed legislation would accomplish this objective by eliminating any doubt as to the status of the agent under the Administration's insurance powers.

"THE CHAIRMAN. In connection with the discussion of section 3d it is requested that the citations of the decisions referred to be supplied for the record in order that anyone desiring to do so may have recourse to them.

"MR. RADNER. We will be glad to supply them.

(The citations requested follow:)

Quinn v. Southgate Nelson Corporation (121 F. (2d) 190 (C.C.A. 2d, 1941), cert. denied 314 U. S. 682);

Margaret M. Brady v. Roosevelt Steamship Company, Inc. (128 F. (2) 169; C.C.A. 2d, 1941)."

In House Report 107, 78th Congress, 1st Session, pages 29-30, the following appears:

"Sec. 3(i) of the committee substitute is intended to avoid potential difficulty by specifically providing that the insurance powers of the War Shipping